FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 480

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
PHILADELPHIA COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR PHILADELPHIA COMPANY, RESPONDENT, IN OPPOSITION.

THOMAS J. MUNSCH, JR.,
C. ELMER BOWN,
PHILIP A. FLEGER,
Attorneys for Respondent.

435 Sixth Avenue,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX.

TABLE OF AUTHORITIES.

STATUTES PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 480

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

PHILADELPHIA COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR PHILADELPHIA COMPANY, RESPONDENT, IN OPPOSITION.

COUNTER-STATEMENT OF CASE.

The Securities and Exchange Commission seeks review of two orders of the Court of Appeals for the District of Columbia:

(a) Order entered October 8, 1947, (R. 231 a) denying a motion to dismiss a petition for review of the Commission's order (dated February 28, 1947) amending its Rule U-49 so as to withdraw an exemption from the Holding Company Act with respect to Pittsburgh Railways Company reorganization proceeding pending in the Western District of Pennsylvania, and

(b) Order entered October 8, 1947, (R. 231 a) staying the Commission's order of February 28, 1947, pending the disposition of the petition for review; and order entered November 4, 1947 (R. 290 a) refusing to modify the stay.

Pittsburgh Railways Company has been in bankruptcy reorganization under Section 77B and Chapter X of the Bankruptcy Act since May 10, 1938, in the District Court for the Western District of Pennsylvania. The Trustees in reorganization have continued to operate the same properties as were operated by the Debtor prior to the initiation of the bankruptcy proceedings. These consist of the properties owned by Pittsburgh Railways Company, and also the properties of 53 so-called "underlier companies" whose properties were operated by Pittsburgh Railways Company pursuant to a system of leases, operating agreements and stock ownership.

Philadelphia Company, the petitioner for review in the Court below, is the owner of stock of gas, electric and street railway subsidiaries, and is a public utility holding company under the Public Utility Holding Company Act of 1935 (15 U.S.C.A. 79, *et seq.*).

Philadelphia Company owns all of the stock of Pittsburgh Railways Company and of certain of its underlier companies. Philadelphia is also a large creditor of Pittsburgh Railways Company and the underlier companies and is a guarantor of obligations of certain of those companies. Certain of the underlier companies of Pittsburgh Railways Company, however, are publicly-controlled and are not subsidiaries of any registered holding company.

Although it was a subsidiary of Philadelphia Company, Pittsburgh Railways Company was the subject of exemptions, pursuant to the rules of the Securities and Exchange Commission, from the provisions of the Public Utility Holding Company Act. Such exemption was first granted by the Commission's Rule U-3D-5, which was followed (incident to a general revision of the Commission's rules as of April 1, 1941) by Rule U-49 (R. 136 a).

The effect of these exemptions was to leave the reorganization proceeding unaffected by the Holding Company Act, and free to follow the normal procedures of Chapter X of the Bankruptcy Act. Under Section 172 of the Bankruptcy Act[1], S.E.C. was and is authorized to render an *advisory* opinion upon a plan of reorganization.

If, however, the reorganization were subject to the provisions of Section 11(f) of the Holding Company Act[2], a plan of reorganization could not become effective unless it had been approved by S.E.C. prior to its sub-

---

[1] The full text of this Section (11 U.S.C.A. 572) is as follows: "After the hearing, as provided in section 169 or section 170 of this Act, and before the approval of any plan, as provided in section 174 of this Act, the judge may, if the scheduled indebtedness of the debtor does not exceed $3,000,000, and shall, if such indebtedness exceeds $3,000,000, submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration. *Such report shall be advisory only.*" (Italics supplied).

[2] Section 11(f) (15 U.S.C.A. 79k [f]) is quoted in the Petition for Certiorari, pp. 23-24. The section provides in part: "In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any regis-

mission to the Court. Under Section 11(f), the Commission has a veto power over a plan of reorganization, in lieu of its advisory jurisdiction under Section 172 of the Bankruptcy Act. The Commission also asserts the sole right to conduct hearings on the plan of reorganization, requiring the Court to act solely upon the record made before the Commission (R. 128 a; *In re Midland United Co.*, 58 F. Supp. 667; D. Del., 1944). As a result of this procedure, the Commission would limit the consideration of the Reorganization Court to such plan as had been approved by the Commission, in lieu of the broad scope of inquiry permitted the Court by Section 169 of the Bankruptcy Act.

In reliance, however, upon the exemption granted by the Commission in the reorganization proceedings, various steps were taken in those proceedings:

1. The Reorganization Court entered its order of November 7, 1938, applying the Chandler Act to the plan of reorganization in the Pittsburgh Rail-

---

tered holding company, or any subsidiary company thereof, the Court may constitute and appoint the Commission as sole trustee or receiver subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. *In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the Court.*" (Italics supplied).

ways proceeding, and contemplating that the Commission's power would be advisory only. (R. 88 a)

2. A plan of reorganization was prepared which made no provision for its submission to the Securities and Exchange Commission under Section 11(f) (R. 90 a).

3. The plan was presented to the Pennsylvania Public Utility Commission for approval under Section 178 of the Bankruptcy Act. (R. 90 a; 109 a) That Commission, after hearings, approved the plan, and rejected the contention of the Securities and Exchange Commission that the capitalization of the Debtor should be much lower than is provided by the plan. The Pennsylvania Commission was given no indication that the Securities and Exchange Commission would ultimately assert a veto power with respect to its action. (R. 90 a) It is impossible to say that the Pennsylvania Commission's judgment was not influenced by S.E.C.'s disclaimer of the power (now sought to be invoked) of producing a stalemate with the P.U.C. in the event of a difference of views, such as in fact occurred, between the two Commissions.

4. The Plan of Reorganization approved by the Pennsylvania Commission was filed with the Reorganization Court on March 17, 1942. (R. 38 a). If the Securities and Exchange Commission had validly asserted jurisdiction under Section 11(f), it would have been necessary at that time to file the plan with that Commission rather than the Court.

5. By thus allowing the plan to be filed with the Court, the Commission caused to be precipi-

tated the question of the jurisdiction of the Court with respect to underlier companies. (R. 90 a) The Commission thus allowed a different issue to be created than would have been created if the plan had been filed under Section 11(f). Since the plan had been filed only under the Bankruptcy Act, the issue before the Reorganization Court was whether the system could be reorganized as a unit *under the Bankruptcy Act*. There was not presented the question (which would have been present if the Commission had asserted its jurisdiction under Section 11(f)) whether the Commission could deal with the system as a unit (including companies which are not subsidiaries of any holding company) *under the Holding Company Act*. (R. 40 a)

6. The Circuit Court of Appeals for the Third Circuit, sustaining the position of the City of Pittsburgh, handed down a mandate which obviously contemplated that further proceedings be conducted *"in court"*. *In re Pittsburgh Railways Company*, 155 F. 2d 477, 480.

7. By promulgating its Rules U-3D5 and U-49, the Commission made it unnecessary for the Trustees of Pittsburgh Railways Company to give consideration to seeking an exemption under Section 2(a)(8) of the Holding Company Act from the jurisdiction of the Commission.

In February, 1947, long after the inception of the reorganization, the Commission amended its Rule U-49(c) so as to withdraw the exemption previously afforded thereby. *The modification is admittedly applicable only to the Pittsburgh Railways situation.* (R. 127 a)

Philadelphia Company filed a petition for review with the Court of Appeals for the District of Columbia. It also requested a stay of the Commission's action pending disposition of the petition for review. The Commission filed a motion to dismiss the petition for review and objected to the motion for stay. On October 8, 1947, the Court denied the Commission's motion to dismiss and granted Philadelphia Company's request for a stay. The Court stated that "we think the petition for review has prima facie merit". (R. 230 a)

The Commission thereupon certified to the Court its "record" in the proceedings before it (R. 1 a). It also requested a modification of the stay. This modification having been denied by order entered November 4, 1947, the Commission, on November 26, 1947, presented to Chief Justice Vinson a motion for a modification of the stay pending the Commission's application for certiorari. After oral argument in chambers, this motion was denied by the Chief Justice. Plan hearings are now under way in the Reorganization Court.

ARGUMENT.

1. The Petition for Certiorari Is Premature.

The petition for certiorari relates to the denial by the Court below of a motion by the Commission to dismiss a petition for review of certain action by the Commission. The merits of the petition for review are still pending before the Court below. A brief on the merits was filed in that Court by Philadelphia Company (petitioner in the Court below) on November 26, 1947, and a brief on the merits was filed by the Commission (respondent in the Court below) on or about December 22, 1947. It follows that even if we assume (without admitting) that this case should ultimately be reviewed by this Court, the present petition for certiorari would be premature. The normal procedure would be to permit the case to be decided on its merits by the Court below and then, upon the whole record, to grant certiorari with respect to such issues as might require consideration. The granting of the instant petition for certiorari might, on the other hand, require a piecemeal consideration of the case by this Court.

When an administrative agency denies a motion to dismiss, and assumes jurisdiction over a case, an appellate court may not entertain an appeal until the agency has completed its consideration of the case on the merits. The analogy indicates that the denial by an appellate court of a motion to dismiss a petition for review of administrative action is not the proper subject of a petition for certiorari. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *F.P.C. v. Metropolitan Edison Co.*, 304 U. S. 375.

2. It Would Be Inequitable to Permit the Commission to Escape Review of the Merits of Its Action Now Under Review in the Court Below.

In the last analysis, this case presents a conflict of jurisdiction between the Securities and Exchange Commission and the Reorganization Court before which the Pittsburgh Railways reorganization proceeding is pending. The Reorganization Court has, since 1938, followed the normal procedures provided by Chapter X of the Bankruptcy Act. The Commission now seeks to cause the Reorganization Court (whether that Court likes it or not) to relinquish to the Commission the function of making the record in plan hearings. The Commission, moreover, would limit the scope and number of plans of reorganization which might be considered by the Court and would exercise a veto power over any plan. In such context there is, at the very least, a substantial question as to whether the Commission may thus change the rules in the middle of the game and cause the Bankruptcy Court to relinquish its normal functions. Cf. *International Union v. Eagle-Picher M. & S. Co.*, 325 U.S. 335; *U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424.

We emphasize, too, a substantial number of the underlier companies of Pittsburgh Railways Company are not subsidiaries of any registered holding company, but are publicly controlled. (R. 120 a-121 a; 130 a). The Court below now has before it (but has not yet decided) the question whether the Commission acted properly in seeking to extend its jurisdiction under the Holding Company Act to a reorganization including non-

subsidiary companies which are not subject to the Holding Company Act.

There is also the problem of conflict between the Securities and Exchange Commission and the Pennsylvania Public Utility Commission. The plan of reorganization for Pittsburgh Railways Company is admittedly subject to the jurisdiction of the Pennsylvania Commission under Section 178 of Chapter X. That Commission has already approved a plan of reorganization. *Re George,* 41 P.U.R. (N.S.) 193. In the proceeding before the Pennsylvania Commission, the S.E.C. adopted an adversary position to the Plan and contended for a capitalization of $10,000,000. The Pennsylvania Commission, however, disagreed with S.E.C. and approved a capitalization of approximately $30,000,000. At the time the case was before the Pennsylvania Commission and for a long time thereafter, S.E.C. made no assertion of its veto power with respect to a plan of reorganization under Section 11(f) of the Holding Company Act. If such an assertion had been made before the Pennsylvania Commission, it is possible that that Commission might have followed a different course than it actually did. Notwithstanding the difference between the two Commissions, S.E.C. now seeks to justify action which would permit it to assume the function of judge (for the purposes of making the record in plan hearings) in a case in which it has already adopted an adversary position. A further effect of its action would create the apparent likelihood of a stalemate between S.E.C. and the Pennsylvania Commission as to the capitalization of the Debtor.

The foregoing discussion indicates only a few of the problems raised by the merits of the case. We here note

them in support of our contention that it would be most inequitable to permit the Commission to escape review by the Court below of the merits of the action there under review.

3. The Case Presents No Question of General Importance.

It is admitted that the Commission's action now under review in the Court below affects only the reorganization proceedings of Pittsburgh Railways Company (R. 127 a). The case merely turns upon the application of well-settled principles to the facts presented by this particular case.

The petition for certiorari suggests (pages 10-11) that the importance of the case arises because it presents the question whether the statutory procedure for the review of an "order" may be invoked to review the promulgation of a "rule". This statement, however, begs the question. The question is, rather, whether under the particular facts of this case the action to be reviewed may be characterized as a "rule" or "order." In dealing with this question, no new or general principle of law was declared by the Court below. That Court merely applied to a particular fact situation the well-settled principles declared by this Court in *Rochester Telephone Corp. v. U.S.*, 307 U.S. 125, and *Columbia Broadcasting Co. v. U.S.*, 316 U.S. 407.

We direct attention to the fact that this Court has denied certiorari in other cases involving the Pittsburgh Railways reorganization. After deciding a question as to the payment of taxes of underlier companies (*Phila-*

delphia Co. v. Dipple, 312 U.S. 168), this Court has refused to grant certiorari in: *Re Pittsburgh Railways Co.,* 155 F. 2d 477, certiorari denied, 329 U.S. 732; and in *Re Pittsburgh Railways Co.,* 159 F. 2d 630, certiorari denied, 331 U.S. 819.

4. The Record Before This Court Is Not the Same as the Record Which Was Before the Court Below When It Denied the Commission's Motion to Dismiss.

Section 24(a) of the Public Utility Holding Company Act requires that, where a petition for review is filed, the Commission shall certify the "record" in the case to the reviewing Court. In the present case, however, the Commission did not file any record in the first instance, but merely filed a motion to dismiss. Consequently, the court below, in assuming jurisdiction over the petition for review acted solely upon the petition for review, a motion to dismiss, and a reply to the motion to dismiss. Not until after the motion to dismiss was denied did the Commission certify to the Court below its "record" in the case. It then sought a modification of the Court's stay-order. When this was denied, it caused to be certified to this Court the entire record before the Court below which, by that time, included the "record" before the Commission.

We emphasize that this Court is asked to consider the denial of its motion to dismiss the petition for review upon a more complete record than was available to the Court below when it acted upon the motion to dismiss. The Commission took the responsibility for excluding

its "record" from the consideration of the Court below when the motion to dismiss was under consideration. The Commission should not now be permitted to obtain review upon a more extensive record.

5. The Granting of a Stay by the Court Below Does Not Present a Proper Issue for Review.

The granting of the stay of which the Commission complains lay with the discretion of the Court below. *Scripps-Howard Radio v. Federal Communications Commission,* 316 U.S. 4, 10-11.

In granting the stay, and in subsequently refusing to modify it, the Court below acted unanimously. The Commission's application to Chief Justice Vinson for a modification of the stay pending the presentation of the instant petition for certiorari was denied by the Chief Justice, after oral argument in chambers, on November 26, 1947. These circumstances are themselves strong evidence that the case involves no abuse of discretion by the Court below.

The Commission argues that the action of the Court below was an interference with the jurisdiction of the Commission (Petition for Cert., pp. 20-21). But this argument ignores the fact that the Commission's action was itself an interference with the jurisdiction of the Reorganization Court. The Court below, being called upon to weigh the competing jurisdictions of the Reorganization Court and of the Commission, properly concluded that the Court should be permitted to continue with the normal administration of the reorganization. Such a decision cannot be called an abuse of discretion.

The practical effect of the granting of the stay order was to preserve the status quo in the reorganization proceedings until the validity of the Commission's action might be fully examined. The Court below, after a preliminary examination of the case, concluded that the petition for review "has prima facie merit". (R. 230 a). It was faced with at least the possibility (we submit, the certainty) that the Commission's action would ultimately be set aside. In such a context it acted conservatively in preserving the status quo of the reorganization proceeding until the Commission's action had been finally tested on its merits.

6. The Stay Order of the Court Below Should Not Be Modified or Set Aside Pending Disposition of the Case by This Court.

As we have pointed out, Chief Justice Vinson denied the Commission's motion for a modification of the stay entered by the Court below pending the presentation of the instant petition for certiorari. We submit that the action of the Chief Justice was correct and should not be reversed. We note, but do not argue, the question whether the full Court could grant a stay after it had been refused by a single Justice. It is significant, however, that the power to grant such stays is confined by Section 350 of the Judicial Code to "a justice of the Supreme Court". It may well be argued that the denial of a stay by a single Justice renders the matter *res adjudicata*.

Even if this Court were to grant the instant petition for certiorari, it should not set aside or modify the stay, pending its review of the case. We have already suggested that the action of the Court below cannot be

characterized as an abuse of discretion. But, in any event, this Court should not reach a contrary conclusion in advance of its assuming jurisdiction and hearing complete argument on the point.

The effect of the stay entered by the Court below was merely to preserve the normal status of the reorganization proceeding of Pittsburgh Railways Company. On the other hand, the Commission's action, in taking the action now under review in the Court below, had sought to change the status quo by injecting certain limitations upon the jurisdiction of the Reorganization Court. The Commission now asks this Court, in effect, to stay a stay. It asks for a double negative, of which the end result would be positive; namely, to change the normal procedure of the Reorganization Court. A stay, we submit, should not be entered by this Court in these circumstances.

Even more important is the fact that hearings on a plan of reorganization have actually been commenced in the Reorganization Court (Petition for Cert., p. 10, n. 7). If this Court were now to set aside or modify the stay entered by the Court below, the effect of its action would be to inject new problems into those pending hearings and possibly to cause them to be terminated.

We also point out that the Commission's request for a modification of the stay of the Court below (Petition for Cert., p. 22) is couched in extremely vague and general terms. This Court would assume a heavy burden in undertaking, in a highly unusual fact situation, to mold or modify a stay in advance of a consideration of the whole case.

Insofar as the Commission may seek to modify the stay so as to permit joint hearings before the Reorganization Court and the Commission, we point out (in addition to the fact that the Reorganization Court has already undertaken hearings without the joinder of the Commission) that the Counsel for the Commission has heretofore advised the Reorganization Court that the Commission's experience in the only case where such concurrent hearings have been held "was such that it would not recommend that procedure again in any other reorganization". (R. 241 a, 247 a, 251 a).

CONCLUSION.

For the foregoing reasons, the prayer of the petition for certiorari should be denied.

Respectfully submitted,

THOMAS J. MUNSCH, JR.,
C. ELMER BOWN,
PHILIP A. FLEGER,
Attorneys for Respondent.